February 7, 2007

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Re: Regency House of Wallingford, Inc., 34-CA-9895, et al

Dear Mr. Heltzer:

Enclosed, please find an original and nine (9) copies of the "Charging Party's Reply in Further Support of its Cross-Exceptions," which was filed today electronically.

Please see that this document is filed and that a date-stamped copy is returned to me in the enclosed self-addressed, stamped envelope for my files.

If you have any questions, please feel free to call me.

Very truly yours,

Randall Vehar
UFCW Assistant General Counsel/
Counsel for ICWUC Local 560C

RV/tp
encl.
cc: Ed Wendel
Larry V. Gregoire
Frank Cyphers
Eric Bray
Richard M. Howard, Esq.
Jeffrey A. Meyer, Esq.
Margaret Lareau, Esq.
Lori Carver

**BEFORE THE**
**NATIONAL LABOR RELATIONS BOARD**

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| **REGENCY HOUSE OF WALLINGFORD, INC.** | ) | **CASE NOS. 34-CA-9895** |
| | ) | **34-CA-9915** |
| **Respondent** | ) | **34-CA-10101** |
| | ) | **34-CA-10075** |
| **-and-** | ) | |
| **INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL/ UFCW, LOCAL 560C,** | ) | **CHARGING PARTY'S REPLY IN FURTHER SUPPORT OF ITS CROSS-EXCEPTIONS** |
| **Charging Party** | ) | |

## PRELIMINARY STATEMENT

In "Respondent's Answering Memorandum of Law to the Cross Exceptions to the Decision of the Administration Law Judge filed by Counsel for the General Counsel and the Charging Party" ("Respondent's Answering Memo.") at 2, Regency House now argues that its delay in effectuating a rescission of its unlawfully-imposed wage changes was "inconsequential"and that the "initial delay in implementing the rescission was ***mutual*** and, once resolved, the ***subsequent*** delay was *de minimus* and based on the Union's request that said rescission occurred during the ***middle of a pay week*** when it **could not be** effectuated." (Emphasis added). **Untrue!** Regency House simply misleads the Board. As shown previously, Regency House's delay was not "inconsequential;" the delay, which first started in January, 2001, was from at least March 26, 2001, through May 31, 2001. *See*, "Union's Memorandum in Support of its Cross-Exceptions to Judge McCarrick's Supplemental Decision and Order" ("Union Cross-Exception Memo.") at 5n.6.

Furthermore, the "initial" delay in implementing the rescission was *not* "mutual," as Regency

House suggests. *See*, Union Cross-Exception Memo. at 4-7, 27-28. Furthermore, Regency House's contention that the rescission "could not be effectuated" during the middle of a pay week simply is factually **untrue**, as shown previously. *See*, Union Cross-Exception Memo. at 8-9, 28.

Regency House also asserts in Respondent's Answering Memo. at 2 that the earliest refusal to bargain date was November 14, 2001, "and no earlier." Again, **untrue!** The General Counsel alleged numerous refusals to bargain *prior* to that date, including a refusal to bargain since on or about July 3, 2001, for a successor-contract, as well as numerous refusals to provide information from September 12, 2001 and thereafter, as well as massive unlawful direct-dealing in October, 2001. All of the Union's allegations on which it bases its assertion that there was a *de facto* "general" refusal to bargain rely on the specific allegations of 8(a)(1) and (5) allegations litigated at the hearing.

In Respondent Answering Memo. at 3, Regency House argues that the Union is seeking a "new rule that a union cannot be decertified during the term of its initial contract." **Untrue** again. Indeed, a union under the "contract-bar" rule normally cannot be "decertified" during its initial 3-year labor agreement. The Union in its earlier briefs has suggested that Regency House *de facto* withdrew recognition on November 14, 2001, not anticipatorily or prospectively effective on February 19, 2002, but *de facto* effective on November 14, 2001. Since Regency House seems to suggest that this is a "new" rule, it also, apparently, believes that it could, in fact, "decertify" the Union mid-contract on November 14, 2001, for all purposes to be effective that date (regardless of what it actually stated), including justifying its refusal to provide *any* information after November 14, 2001. Not only is such not the law, but Regency House's arguments strengthen the Union's position that Regency House should be treated as having *de facto* withdrawn recognition effective on November 14, 2001, or before, not effective on February 19, 2002.

Nevertheless, Regency House grossly misconstrues the Union's argument regarding the employees' right to file a decertification petition during the "open window" period *for purposes of obtaining an election*. The Union has not requested a change in the "open window" period, nor has it argued that *employees* may not file an *untainted* RD-petition during the "open window" period to obtain an election.[1/] The Union only argues that a Recognition Clause precludes an employer from filing an RM-petition or withdrawing recognition while that Clause is in effect.

In Respondent Answering Memo. at 4, Regency House argues against the Union's request for novel and extraordinary relief, claiming that, "none of the signatories to the Petition were even aware of the purported unfair labor practices the ALJ found tainted the petition." **Untrue!** Nearly the entire unit was aware of the unlawful direct-dealing employee meetings that were held on October 19-20, 2001, prior to when most employees signed the petition, while the entire unit had GC-11, one of the denigrating documents, distributed to them by the Respondent.

## LAW AND ARGUMENT

A. The initial delay in implementing the wage rescission was not mutual.

Regency House's position that its "initial" delay in effectuating the Union's demand for a rescission was "mutual" is not only laughable, but **untrue**! As explained more fully in its previous brief, if Regency House had complied with the Union's March 19, 2001, rescission demand, that rescission would have been effective on March 26, 2001. It was not put into effect that date and there was no "mutual" decision to justify that delay.[2/] Thus, to claim that the "initial" delay was the

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[1/]Regency House misstates the terms of the "open window" period for a health care facility, which actually is at least 90, but no more than 120, days prior to contract expiration. *See*, Trinity Lutheran Hosp., 218 NLRB 199 (1975).

[2/]If the rescission had been put into effect on Monday, March 26, 2001, the appropriate checks would have been "cut" on Monday, April 2, 2001, and issued and distributed on Thursday, April 5, 2001. *See*, "Union Cross-Exception Memo. at 5n. 7. The April 5, 2001, checks did not reflect the rescission. (T. 412-

product of a "mutual" agreement between the parties simply is **untrue**! Obviously, since the Union initially did not want to have Regency House "take back" any wages already paid -- which would only aggravate the split in the unit further (possibly what Regency House was hoping would happen) -- the effective date for the rescission, which by then had passed, had to be pushed to April 16, 2001, *because of Regency House's unlawful delay*.

Furthermore, Regency House in Respondent's Answering Memo. at 6 simply is not credible when it asserts that Mendolusky's April 12, 2001, letter (GC-7) acknowledged that "the parties" had been waiting for the Board's "imprimatur" before effectuating the wage rescission. Simply **untrue!** One would have to give a huge "spin" to Mendolusky's April 12, 2001, acerbic letter to Respondent's counsel to interpret it as acknowledging that "the parties" -- *which would include the Union* -- was waiting for the Board to adopt the unappealed Judge Marcionese's Decision before Respondent could effectuate the wage rescission. If anything, Mendolusky went overboard in criticizing Respondent's counsel for not rescinding earlier.

Curiously, in Respondent's Answering Memo. at 7, Regency House conveniently and completely ignores the delay in effectuating Mendolusky's demand that the rescission be put in effect on April 16, 2001, when it waited nearly two weeks until April 23, 2001 (when its April 20, 2001, letter was mailed [GC-9]), to frivolously question the authority of *appointed*-union Representative Mendolusky -- with whom it had been dealing regarding the Local Union since March, 2000 -- to demand the wage rescission. This forced *elected* Unit Vice President Carver to deliver a hand-written letter dated April 24, 2001, demanding that the wage rescission promptly be put into effect,

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16). Consequently, when Respondent Mendolusky on April 12, 2001, sent Regency House's counsel a letter requesting that the rescission be made effective April 16, 2001, there was no need for Mendolusky to "hint," as Regency House criticizes him for not doing, that Regency House previously had "delayed" in rescinding the wages. Regency House *already* **knew** that it had not timely issued appropriate checks a week before on April 5, 2001, to reflect the wage rescission!

though this time the frustrated Carver went further stating that, if necessary, payroll was to be revised *retroactively* as of Monday, April 16, 2001. (GC-10). While appropriate checks, then, should have issued on Thursday, April 26, 2001, they were not and there was **no** "mutual" agreement that the rescission **not** be effectuated **on that date**. Only by ignoring this history in March and between April 12 and April 30, 2001, can Regency House even make its frivolous argument that the "initial" delay was the product of "mutual" agreement between the parties. Hog wash! Carver only verbally acquiesced on May 1, 2001, to another delay, memorialized in her May 2, 2001, letter (GC-13) *after* Respondent *again* had failed to *timely* effectuate the rescission on April 30, 2001. At best, this was the first and only so-called "mutual" delay!

Regency House's defense for not promptly rescinding was that it was attempting to negotiate a compromise based on its direct-dealing with some unit employees. Whether or not the Union, by its rescission decision, was causing an internal problem for itself with these employees was for the Union to address *without* Regency House's intervention and involvement. Regency House should have dealt *only* with the Union regarding the wage-rescission matter; instead, it delayed its effectuation of the Union's lawful rescission demand because of its own, effectively-admitted, unlawful direct-dealing with unit employees.

Regency House's assertion in Respondent's Answering Memo. at 7, "that wages *could not* be rescinded effective that day as it was the middle of a payroll week" again simply is **untrue!** (Union Cross-Exception Memo. at 8-9, 27-28).

Regency House then falsely asserts that there was "no evidence presented that the rank-and-file employees even knew or believed there was a 'delay' in implementing the rescission." (Respondent's Answering Memo. at 8). Again, **untrue!** By memorandum to "All Regency House Staff" dated April 25, 2001, Regency House notified the entire unit that the Union had requested a

rescission in the wage increase so as to "lower the hourly rates for those employees who got the increase" and it attached to that Memorandum Carver's letter in which she demanded that payroll, if necessary, be revised so that the effective date of the rescission was April 16, 2001. (GC-11). Nevertheless, the wage rescission was not effectuated and put into the employees' paychecks until more than a month later on May 31, 2001.

B. The Union's request for extraordinary remedies, including litigation costs, an extended insulated period, and an access remedy, was appropriate.

Regency House's misstatements, misrepresentations, **untrue** statements, and frivolous arguments in Respondent's Answering Brief should eliminate any doubt that the Union's request for extraordinary remedies, including its litigation costs and expenses, was proper. *See*, Pratt Towers, Inc., 338 NLRB 61 (2002).

Furthermore, since the Union unlawfully was effectively denied the protection of its Recognition Clause from July 3, 2001, through February 19, 2002, and its irrebutable presumption of majority support under the CBA, when Regency House unlawfully refused to bargain for a successor-contract or provide relevant information, while holding mass direct-dealing meetings with nearly the entire unit, the Union's request for an extended insulated bargaining period with similar access to the unit if the employer chooses to address employees during working hours is not only appropriate, but necessary, to remedy the violations of the Act, as argued more fully to Judges Edelman and McCarrick. *See, e.g.*, H.W. Elson Bottling Co., 155 NLRB 714 (1965), *modified*, 379 F.2d 223 (6th Cir. 1967).

C. Judge Edelman's refusal to hear evidence, whether or not a correct evidentiary ruling, does not demonstrate "an unprecedented level of bias and partiality against Respondent which irretrievably tainted the instant trial."

In an excessive, unwarranted attack on Judge Edelman, Regency House now asserts that he

has not only demonstrated a pattern of impropriety and bias against every matter in which he was involved, relying on Fairfield Tower Condominium Assn., 343 NLRB No. 101, n. 1 (2004) and Dish Network Service Corp., 345 NLRB No. 83 (2005), as cases in which he has demonstrated "a pattern of impropriety and bias." Regency House's reliance on Fairfield Tower is mystifying, since the Board did not find that Judge Edelman was biased, or that his actions, in that case rose to the level of impropriety. And in Dish Network, while this Board did remand that case for further consideration because of extensive copying from the General Counsel's brief, it also held that Judge Edelman had "conducted the hearing itself properly" and it instructed the new judge "to rely on Judge Edelman's credibility findings in so far as they are based on the demeanor of the witnesses." That finding hardly demonstrates "a pattern of impropriety and bias which has tainted the record of every matter in which he was involved." It may have reflected that Judge Edelman at times may have been a bit lazy in drafting his opinion, so as to raise an *appearance* of impropriety, but that is not the same thing as accusing -- or finding -- that Judge Edelman's actions rose to an "unprecedented level of bias and partiality."

Regency House's argument that employees' *actual*, subjective, inner-most (possibly previously non-verbalized) thoughts as to why they may not have supported the Union should have been subject to direct examination by their employer already has been effectively rebutted in the General Counsel's and the Union's earlier briefs. As previously shown, the proper analysis is based upon an objective, not a subjective, approach.[3/] Nevertheless, even if Judge Edelman's evidentiary ruling was incorrect, that is not a basis to find that he was actually biased or prejudiced against

[3/]Regency House, though it filed no exceptions to the matter, seeks to improperly rely on rejected exhibits, when it argues that there were two previous decertification or de-authorization petitions filed prior to the wage-rescission issue. However, those documents were not received into evidence, in part, because they were "tainted" by Regency House's earlier, unremedied unfair labor practices.

Respondent. Otherwise, every erroneous evidentiary ruling by a judge would result in a remand to a new judge. That has not been, and should not be, the Board's practice.

D. Respondent did not meet its burden to establish that it lawfully withdraw recognition from the Union prior to, or after, expiration of the existing contract.

In Respondent's Answering Memo. at 15, it apparently suggests that it could withdraw recognition, *even during the term of a contract*, "predicated on a reasonable doubt based on objective considerations of the Union's majority status." Regency House is wrong. Actual withdrawal may only occur after expiration of a 3-year CBA based on *objective* evidence of an *actual* loss of majority support. *See*, Union Cross-Exception Memo. at 18-22.

Furthermore, Regency House apparently does not appreciate that an RD-petition -- since Levitz Furniture, 333 NLRB No. 105 (2000) -- may be used for different purposes and, depending on the purposes, the Board may need to approach the matter differently. For instance, whether or not an RD-petition is sufficient for the Board to schedule an election is an administrative matter for the NLRB Region to investigate without the identity of the petition signees even being divulged. If the Region determines that an untainted RD-petition is supported by at least 30% of the unit and has been timely filed, an election will be set. Even if the parties continue to bargain and reach a successor-contract, if the union should lose that election, the successor-contract will become void.

However, if an employer is going to rely on a petition to support *its* withdrawal of recognition *without an election*, then that petition objectively must establish an *actual* loss of majority support *as of the date of withdrawal* and **actual** withdrawal cannot occur until *after* contract expiration, not sometime during the term of a 3-year agreement, *see*, Parkwood Development Center, Inc., 347 NLRB No. 95 (2006), nor during the term of *any* CBA of *any* length that has a contractual

"recognition clause" that would prevent the employer from withdrawing recognition.[4/] *see,* Houston Div. of Kroger Co., 219 NLRB 388 (1975). Apparently, Regency House would have this Board adopt a rule that -- regardless of the authenticity of *any* signature on a petition; regardless of the lack of an examination by the employer as to whether the signatures compared favorably with the employer's records of employee signatures; and regardless of whether each signee was shown to be a unit member as of the date when recognition actually could be withdrawn -- the employer could rely on such an unsubstantiated, premature petition to withdraw recognition and not be required later to prove an *actual* loss of majority support upon CBA expiration. Indeed, the employer would have the Board ignore the contractual Recognition Clause or apparently permit signatures to be considered that had been obtained at *any* time during the term of a 3-year agreement. Under Respondent's approach, one must ask, could the signatures be obtained during the first year of that 3-year CBA, with remaining signatures obtained throughout the following two years? Respondent proposes no "Bright-Line" rule.

The Board's position in Chelsea Industries, Inc., 331 NLRB No. 184 (2000), that the signatures should be obtained ***after*** the 1-year "certification" bar has expired, is a "Bright-Line" rule that similarly should be applied here, so that signatures must be obtained after the CBA expires ***for recognition withdrawal purposes without an election***. Signatures for an RD-petition ***to obtain an election*** still could be obtained during the "open window."

E. Respondent "generally" refused to bargain with the Union.

The Union previously has shown that Respondent ***de facto*** "generally" refused to bargain with the Union when it unlawfully refused to bargain for a successor-contract from July 3, 2001, on

[4/] While a contractual recognition clause might preclude an *employer* from withdrawing recognition during a five-year CBA and prevent the employer from filing an RM-petition, it should not prevent the *employees* from filing an RD-petition after 3-years had passed under that CBA.

and/or from September 14, 2001, on; when it failed to provide massive amounts of information; when it cancelled contract-administration meetings; and when it engaged in massive direct-dealing -- ALL *before* November 14, 2001.

Nevertheless, regardless of whether the Board addresses and finds that Regency House *de facto* "generally" refused to bargain prior to November 14, 2001, its failure to bargain for a successor- contract *after* November 14, 2001, still is unlawful. Significantly, Regency House does not address the Union's arguments that any effective "suspension" of bargaining for a successor-contract between the announcement of an anticipatory recognition withdrawal and the purported actual withdrawal -- if not prohibited, as otherwise argued by the Union, by the Recognition Clause -- can only be sanctioned, retroactively, *if* the employer establishes an *actual* loss of majority support *at the time that the withdrawal of recognition becomes effective*. Regency House does not address, nor rebut, the Union's position that it has not met its burden to establish that there was an actual loss of majority support *as of February 19, 2002*.[5/]

## CONCLUSION

For the reasons stated above and in its previous briefs, the Cross-Exceptions should be sustained.

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[5/] Regency House could not establish that fact since it did not even establish (1) what the size of this fluctuating bargaining unit was, or which petitioning employees were in the bargaining unit, *as of February 19, 2002*. On the other hand, the Union established that this bargaining unit was fluctuating, that per diem nurses moved in and out of the bargaining unit frequently, while the General Counsel showed that the employer had presented other petitions which contained names on it that were not bargaining unit members as of the time of signing.

Respectfully submitted,

s/ Randall Vehar

Randall Vehar (Ohio Bar No. 0008177)
UFCW Assistant General Counsel/
Counsel for ICWUC Local 560C
1799 Akron Peninsula Road
Akron, OH 44313
330/926-1444 Ext. 146
330/926-0950 FAX
RVehar@UFCW.org

Robert W. Lowrey (Ohio Bar No. 0030843)
UFCW Assistant General Counsel/
Counsel for ICWUC Local 560C
1799 Akron Peninsula Road
Akron, OH 44313
330/926-1444 Ext. 138
330/926-0950 FAX
RLowrey@UFCW.org

**Attorneys for the Charging Party**

## CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2007, two copies of the foregoing, having been properly addressed, have been sent by regular U.S. mail service delivery to:

Richard M. Howard, Esq.
Jeffrey A. Meyer, Esq.
KAUFMAN DOLOWICH SCHNEIDER BIANCO & VOLUCK, LLP
135 Crossways Park Drive, Suite 201
Woodbury, NY 11797

**Counsel for Respondent**

Margaret A. Lareau, Esq.
Queslyah S. Ali, Esq.
National Labor Relations Board
Region 34
280 Trumbull Street
21st Floor
Hartford, CT 06103-3599

**Counsel for the General Counsel**

s/ Randall Vehar
Randall Vehar, Esquire